

JOSEPH P. RUSSONIELLO (CABN 44332)
United States Attorney

BRIAN J. STRETCH (CABN 163973)
Chief, Criminal Division

CHRISTINA HUA (CABN 185358)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7534
Facsimile: (415) 436-7234
E-mail: tina.hua@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	No. CR 07-0560-JSW
)	
Plaintiff,)	
)	
v.)	GOVERNMENT'S REPLY TO
)	DEFENDANT'S SENTENCING
VALERIAN DOBRE,)	MEMORANDUM
)	
Defendant.)	

As set forth in the government's sentencing memorandum, the government opposes defendant VALERIAN DOBRE's sentencing position that neither the two level enhancement for sophisticated means nor the four level enhancement for more than fifty victims applies. In the defendant's sentencing memorandum, DOBRE cites a Sixth Circuit case, United States v. Yagar, 404 F.3d 967 (6th Cir. 2005), to support his proposition that the four level enhancement for more than fifty victims should not apply. The government agrees that the Ninth Circuit has not addressed the issue, but disagrees with the reasoning in Yagar. Instead, the Court should follow the reasoning of the Eleventh Circuit in United States v. Lee, 427 F.3d 881 (11th Cir. 2005), and find that the multiple victim enhancement applies.

1 In Lee, the Eleventh Circuit rejected the Yagar court's reasoning in finding that
 2 individuals suffering a monetary loss that was short-lived and immediately covered by a third
 3 party are not victims for sentencing purposes. Id. at 895. The Lee court found that the Sixth
 4 Circuit's view did "not comport with the Guidelines" and concluded that individuals who are
 5 able to offset their losses could still be considered victims for Guidelines purposes. Id. at 895.
 6 The Eleventh Circuit explained that the Yagar opinion did not appear to read the actual loss
 7 provisions of the Guidelines together with the Application Notes discussing credits against loss,
 8 which is required. Id. The credit against loss provisions treat people recovering collateral,
 9 money, property or services as having suffered a loss, but allow a defendant credit for that
 10 recovery. Id. The Eleventh Circuit stated:

11 Yagar, of course, is not binding upon this court and only has effect upon us to the extent
 12 of its persuasiveness. . . . When considering the impact of recovered collateral, or the
 13 return of money, property, or services, to the victim, the Guidelines treat those so
 14 recovering as having suffered a loss but then allow the defendant to take credit against
 15 the total loss for the value of the recovered or returned loss. Stated another way, inherent
 16 in the credit against loss provision is an acknowledgment that there was in fact an initial
 17 loss, even though it was subsequently remedied by recovery of collateral or return of
 18 goods.

19 Id. at 895. The Eleventh Circuit concluded that the Guidelines allow a court to find an actual
 20 loss by a reimbursed party, and therefore treat that party as a victim.¹ Id.

21 The government believes that this reasoning by the Eleventh Circuit is the sound
 22 approach. In the instant case, the bank reimbursed the victims the same day or the day after the
 23 fraud occurred. Each account was flagged as compromised, and new cards had to be issued to
 24 each account holder. While the Yagar court did acknowledge possible situations where the
 25 numerable victim enhancement should apply even though the victim is ultimately reimbursed,
 26 broadly applying the rule where reimbursed victims are not counted as victims could lead to
 27 unfair and nonsensical results. A defendant who was lucky enough to steal from 100 victims
 28 who happen to be insured could be treated the same as a defendant who stole from one uninsured

29 ¹ Note that the Lee court specifically rejected the reasoning of the Yagar court, despite
 30 the fact that it could have merely distinguished the case on the facts. The monetary losses in Lee
 31 were neither short-lived nor immediately covered by third parties.

1 individual. Furthermore, some fraud cases could become victimless crimes. In the case where
2 all the victims had collateral, such as property, which increased in value and covered the cost of
3 fraud, there would be no victims to the crime. Therefore, the Court should reject the reasoning
4 set forth by the Yagar court and adopt the more sensible approach by the Eleventh Circuit to find
5 that the enhancement for more than fifty victims applies.

6 DATED: July 28, 2008

Respectfully submitted,

7
8 JOSEPH P. RUSSONIELLO
United States Attorney

9
10 /s/
11 CHRISTINA HUA
Assistant United States Attorney
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28